MAJLIS PERBANDARAN SEBERANG PERAI v. PENGURUSAN DANAHARTA NASIONAL BERHAD; ASCORT FRONTIER SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, PULAU PINANG
NORDIN HASSAN JC
[CIVIL SUIT NO: 22-497-2003]
14 APRIL 2015

LOCAL GOVERNMENT: *Rates – Arrears of assessment – Claim for – Whether plaintiff could recover arrears in assessment from defendant pursuant to ss. 146 and 147 of Local Government Act 1976 ('LGA') – Whether defendant registered proprietor of property – Whether plaintiff could rely on ss. 156 and 160(5) of LGA to establish its claim for arrears in assessment against defendant – Whether defendant liable to pay arrears under LGA – Whether a disclosed claim under s. 14(3) of Pengurusan Danaharta Nasional Berhad Act 1998 – Whether defendant's right to claim against third party arose – Whether third party liable to indemnify defendant against payment of any arrears*

A company, Utama Impian Sdn Bhd ('Utama Impian'), was the original owner of a piece of property ('the property'). Pursuant to s. 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act'), the defendant, a public company established by the Government of Malaysia as the National Asset Management Company, had acquired all the rights, title and interests of Oriental Bank Berhad ('OBB') with regards to loan facilities granted to Utama Impian including the said property. By a vesting certificate issued pursuant to s. 14(7) of the Danaharta Act, the said property was vested in the defendant. The defendant then appointed one Razalee and one Tan as the special administrators of Utama Impian pursuant to s. 25A of the Danaharta Act. Thereafter, the special administrators, *vide* several letters to the plaintiff, a statutory body established under the Local Government Act 1976 ('the LGA'), requested that the outstanding arrears in assessment of the said property in the sum of RM1,813,836.23 to be waived or reduced or to be paid by instalments for a period of 17 months. However, the plaintiff rejected these requests and pursuant to s. 148 of the Danaharta Act, issued a notice to the special administrator of Utama Impian and claimed the said arrears in assessment in a total sum of RM3,769,077.09. As no payment of the said arrears in assessment was received by the plaintiff, the plaintiff commenced this suit against the defendant and claimed, *inter alia*, arrears in assessment of the said property. Shortly after the commencement of this suit, the plaintiff issued a notice to the defendant and demanded the defendant pay the sum of RM3,769,077.09 being the total outstanding assessments of the said property. Several years later, the defendant entered into a sale and purchase agreement ('the agreement') with a third party ('the third party') whereby the defendant agreed to sell and the third party agreed to purchase the said property for a purchase price of RM21,333,333. Clause 7 of the

agreement provided that all outstanding quit rent and assessments payable in respect of the said property shall be borne by the purchaser that was the third party. The third party then wrote to the plaintiff and requested that the said arrears in assessment be waived and subsequently agreed to pay the outstanding assessments with discount and proposed a scheduled payment to pay the said arrears. However, the plaintiff had rejected the third party's request and proposal. In the meantime, the defendant had informed the third party that the third party had paid the full purchase price and the third party may take possession of the said property subject to the third party undertaking and conformation to release the defendant from any liabilities. The third party had agreed with the proposed undertaking and had signed an undertaking to that effect. The said property was then registered under the third party's name. The defendant then obtained a court order to include the third party in this suit. The plaintiff submitted that based on the vesting certificate which was issued by the defendant, all liabilities of Utama Impian including the arrears in assessment was to be paid by the defendant. The plaintiff averred that the plaintiff could recover the arrears in assessment from the defendant pursuant to ss. 146 and 156 of the LGA. On the other hand, the defendant contended that the defendant was not liable to pay the said arrears in assessment as the defendant was not the owner but only the chargee of the said property. The defendant also contended that as the third party was the current registered owner of the said property and by virtue of ss. 146, 147 and 156 of the LGA, the third party was liable to pay the said outstanding assessment. The third party in its counterclaim conversely submitted that the third party was not liable to pay the outstanding assessment as there was no disclosed claim by the defendant as envisaged under s. 19(3) of the Danaharta Act and that the third party was not liable to indemnify the defendant against the payment of any arrears in assessment.

Held (dismissing plaintiff's claim against defendant; allowing third party's counterclaim):

(1) The wordings of ss. 146 and 147 of the LGA are clear and unambiguous. Section 146 provides that all rates shall be paid by the owners of the holdings for the time being and s. 147 stated that the owner shall be liable for any unpaid rate. The defendant herein was not the registered proprietor of the said property or the party receiving rent of the said property. As such, the defendant was not the owner of the said property envisaged by the said ss. 146 and 147. (paras 38 & 40)

(2) It was an undisputed fact that the current owner of the said property was the third party. However, this suit was not the plaintiff's claim against the third party but against the defendant. No notice under s. 160(4) of the LGA had been given and no transfer or sale had been recorded in the books of the local authority. As such, the plaintiff could not rely on s. 160(5) of the LGA to establish its claim for the arrears in assessment against the defendant. (paras 43 & 45)

(3) Although it was clear that s. 156 of the LGA empowers the local authority to sue and recover as a debt any arrears from a person liable to pay the said arrears, the defendant herein was not the owner of the said property as envisaged under ss. 146 or 147 of the LGA. As such, the defendant was not the person or party liable to pay the arrears under the LGA. Therefore, s. 156 was not applicable for the plaintiff to bring the claim against the defendant. (paras 50 & 51)

(4) By virtue of s. 14(3) of the Danaharta Act, Danaharta is only responsible for a disclosed claim. The facts herein showed that there was no claim in writing for the arrears in assessment by the plaintiff to the defendant prior to the vesting date. The vesting date was on 11 March 1999 and the plaintiff filed the writ and statement of claim on 22 August 2003. The notice of demand dated 3 September 2003 was issued to the defendant after the commencement of this suit. Therefore, the plaintiff's claim was not a disclosed claim within the meaning of s. 14 of the Danaharta Act. (paras 54 & 56)

(5) The plaintiff had averred that the special administrator was an agent and acted on behalf of the defendant and as such it showed that the defendant had knowledge and was liable to pay the said arrears. This contention was clearly untenable and unsupported by the provisions of the Danaharta Act. The special administrators appointed in this case under s. 25A of the Danaharta Act were not acting for or an agent of the defendant but an agent and acting on behalf of Utama Impian Sdn Bhd. Thus, the plaintiff had failed to prove its claim against the defendant. (paras 58, 59, 60 & 62)

(6) As for the defendant's case against the third party, it is trite law that the defendant has the right to contribution or indemnity from the third party only if the defendant is held liable to the plaintiff. As such, this court had decided that the defendant was not liable to the plaintiff, hence the defendant's right to claim against the third party did not arise. (paras 63 & 64)

(7) The defendant's claim against the third party was neither a 'registered interest' nor a 'disclosed claim' under the Danaharta Act. The third party was also not liable to indemnify the defendant against the payment of any arrears in assessment in relation to the said property for any period prior to 23 August 2011. (para 91)

Case(s) referred to:

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Dewan Bandaraya Kuala Lumpur lwn. Suppiah Govindasamy [1991] 1 CLJ 429; [1991] 1 CLJ (Rep) 104 SC ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125 HC ***(refd)***

Majlis Bandaraya Melaka Bersejarah lwn. Eyo-Li Sdn Bhd [2014] 1 CLJ 733 HC ***(refd)***

A *Mat Abu Man v. Medical Superintendant, General Hospital Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC* ***(refd)***
Ng Kim Hwa v. Ng See Chow & Ors [1993] 1 LNS 89 HC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***
B *Sundralingam v. Ramanathan Chettiar [1967] 1 LNS 173 FC* ***(refd)***
Tan Tak & Ors v. Mahabuilders Sdn Bhd [2006] 5 CLJ 490 HC ***(refd)***

Legislation referred to:
Housing Developers (Control and Licensing) Rules 1970, r. 12
Local Government Act 1976, ss. 2, 13, 127, 146, 147, 156, 157, 160(4), (5)
C Pengurusan Danaharta National Berhad Act 1998, ss. 2, 14(1), (2), (3), (7), 19(1), (3), 21, 25A, 32, 148

For the defendant - Raiza Zakaria; M/s Albar & Partners
For the plaintiff - CV Prabakaran; M/s Praba & Assocs
For the 3rd party - Mureli Navaratnam (Yeo Yang Poh & Teng Peck Yin with him); M/s Yeo Chambers
D

Reported by Suhainah Wahiduddin

JUDGMENT

E **Nordin Hassan JC:**

Introduction

[1] The plaintiff is a statutory body which was established under the Local Government Act 1976 ('the LGA') and a body corporate under s. 13 of the same act.
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[2] The defendant is a public company incorporated under the Companies Act 1965 with its powers and duties as provided under a special law, Pengurusan Danaharta Nasional Bhd Act 1998 ('the Danaharta Act'). The defendant was established by the Government of Malaysia as the National Asset Management Company to deal with financial crisis in 1997. As can be seen from the preamble of the Danaharta Act, the function of the defendant among others is to assist financial institutions by recovering impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalisation of the nation's economy by injecting liquidity into the financial system. These functions are to be achieved through the acquisition, management, financing and disposition of assets and liabilities.
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[3] The third party is a company incorporated on 1 June 2010 under the Companies Act 1965 and its registered address is at Lot 9A, Jalan 223, 45100 Petaling Jaya, Selangor.
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Background Facts

[4] A company, Utama Impian Sdn Bhd ('Utama Impian') was the original owner of a property known as Plaza Utama at Lot 1298, Bukit Mertajam, Seberang Perai Tengah, Pulau Pinang ('the said property').

[5] On 26 February 1999, pursuant to s. 14 of Danaharta Act, the defendant had acquired all the rights, title and interest of Oriental Bank Berhad ('OBB') with regards to a loan facilities granted to Utama Impian including the said property which was charged by Utama Impian to OBB.

[6] On 11 March 1999 a vesting certificate was issued pursuant to s. 14(7) of Danaharta Act. By this certificate, the said property is vested in the defendant. The certificate reads as follows:

> This is to certify that, on and from the vesting date stated above all present and future rights, title and interest in and disclosed obligations with respect to the assets described in the Schedule vest in Pengurusan Danaharta Nasional Berhad free of any encumbrances of claim save for any registered interest prevailing as the vesting date and disclosed claims.

[7] The defendant then appointed Encik Razalee Amin and Encik Tan Kong Meng as the special administrators of Utama Impian with effect from 1 June 2000. This appointment was made pursuant to s. 25A of the Danaharta Act.

[8] Thereafter, Tan Kok Meng, *vide* letter to the plaintiff dated 9 February 2001, requested that the outstanding arrears in assessment of the said property in the sum of RM1,813,836.23 to be waived or reduced or to be paid by instalments for a period of 17 months.

[9] Another letter dated 29 April 2001 was sent to the plaintiff by Encik Razali Amin appealing for the said amount of arrears in assessment to be waived or reduced.

[10] However, the plaintiff had rejected these requests and pursuant to s. 148 of the Danaharta Act, the plaintiff issued a notice dated 15 July 2003 to the special administrator of Utama Impian and claimed the said arrears in assessment as at 31 December 2003 in a total sum of RM3,769,077.09.

[11] As no payment of the said arrears in assessment was received by the plaintiff, on 22 August 2003, the plaintiff commenced this suit against the defendant. The plaintiff's claims as stated in the statement of claim, are as follows:

(i) arrears in assessment for the said property as at 31 December 2003 in the sum of RM3,395,564.96

(ii) arrears rate from 30 June 2001 until 31 December 2003 in the sum of RM373,512.13.

(iii) costs.

[12] About ten days after the plaintiff had commenced this suit, plaintiff then issued a notice dated 3 September 2003 to the defendant and demanded the defendant to pay the sum of RM3,769,077.09 being the total outstanding assessments of the said property as at 31 December 2003.

[13] Seven years later, on 3 November 2010, the defendant entered into sale and purchase agreement ('the agreement') with the third party whereby the defendant agreed to sell and the third party agreed to purchase the said property for a purchase price of RM21,333,333.

[14] Clause 7 of the agreement provides that all outstanding quit rent and assessments payable in respect of the said property shall be borne by the purchaser that is the third party.

[15] Apart from that, cl. 2.2.5(b) of the agreement provides that the purchaser shall be deemed to have purchased the said property with full knowledge and notices of all such schemes or proposed schemes including layout plans, matters, notices, charges and claims which shall be complied with and discharged by the purchasers and shall not make or raise any objection or requisition whatsoever.

[16] After the execution of the agreement, the solicitor for the third party Messrs May Chan Eiza and Co *vide* letter dated 3 December 2010 to the defendant's solicitor informing that the third party at the material time, is applying to the plaintiff for waiver or exemption of all outstanding assessments in relation to the said property.

[17] The third party then *vide* letter to the plaintiff dated 3 December 2010 requested that the said arrears in assessment to be waived. Thereafter, *vide* letter dated 19 May 2011, the third party then agreed to pay the outstanding assessments with discount and proposed a schedule payment to pay the said arrears. However *vide* letter dated 13 June 2011 the plaintiff had rejected the third party's request and proposal.

[18] Subsequently, the defendant informed the third party *vide* letter dated 22 August 2011 that the third party had paid the full purchase price and the third party may take possession of the said property subject to the third party undertaking and conformation to release the defendant and its group of companies from any and all past, present and future obligations, liabilities, promises, agreements, liens, charges, demand, complaints, causes of action, actions, damages or injuries of any kind or nature, arising out of or in connection with the possessions of the said property.

[19] On the 23 August 2011, the third party had agreed with the proposed undertaking and had signed an undertaking to that effect.

[20] On the same day, 23 August 2011 a certificate of sale by private treaty was issued by the defendant.

[21] On 28 November 2011, the said property was registered under the third party's name.

[22] On 15 November 2013, the defendant had obtained a court order to include Ascot Frontier Sdn Bhd as a third party in this suit.

Submissions By Parties

[23] The plaintiff basically averred that based on the vesting certificate dated 11 March 1999 which was issued by the defendant, all liabilities of Utama Impian including the arrears in assessment is to be paid by the defendant. The plaintiff submits that the plaintiff can recover the arrears in assessment from the defendant pursuant to s. 146 and 156 of the LGA.

[24] On the other hand, the defendant contends that the defendant is not liable to pay the said arrears in assessment as the defendant is not the owner but only the chargee of the said property. As such the plaintiffs claim under s. 146 of the LGA is without merits. The Supreme Court case of *Dewan Bandaraya Kuala Lumpur lwn. Suppiah Govindasamy* [1991] 1 CLJ 429; [1991] 1 CLJ (Rep) 104 and the High Court case of *Majlis Bandaraya Melaka Bersejarah lwn. Eyo-Li Sdn Bhd* [2014] 1 CLJ 733 were quoted to support the defendant's contention.

[25] Apart from this, the defendant contends that the plaintiff's claim is not a disclosed claim within the meaning of s. 14 of Danaharta Act. It was argued that the said property vests in Danaharta on the vesting date specified in the vesting certificate and the vesting certificate is conclusive evidence that the said property has been vested in the defendant. Therefore on and from the vesting date, the defendant acquires all rights, title and interest in the said property only to registered interests and claims disclosed to the defendant before the vesting date. The defendant further submits that the effect of vesting is to preclude any person from raising any claim against the defendant in relation to the said property unless the claim is a disclosed claim. The case of *Tan Tak & Ors v. Mahabuilders Sdn Bhd* [2006] 5 CLJ 490 was quoted to support the defendant's argument.

[26] The defendant also submitted that the special administrators appointed under s. 25A of Danaharta Act were acting on behalf of or for Utama Impian Sdn Bhd and not for the defendant. Sections 32, 21 and interpretation of 'corporation' under s. 2 of Danaharta Act were referred to by the defendant to fortify this contention.

[27] In addition, the defendant contends that the plaintiff had failed to prove the calculation of the outstanding assessments. It was argued that the plaintiff had failed to call any valuer or witness to substantiate the plaintiff's claim and to justify the calculation of the outstanding assessments.

[28] The defendant further submitted that in the event that the defendant is held liable to pay the plaintiff the outstanding assessment, the third party is then liable to indemnify the defendant by virtue of the sale and purchase agreement dated 3 December 2012. Clause 7 and 2.2.5(b) of this agreement were relied by the defendant to support its claim.

[29] The defendant also contends that as the third party is the current registered owner of the said property and by virtue of ss. 146, 147 and 156 of the LGA, the third party is liable to pay the said outstanding assessment.

[30] The third party conversely submitted that the third party is not liable to pay the outstanding assessment as there is no disclosed claim by the defendant as envisaged under s. 19(3) of the Danaharta Act.

[31] The third party further argued that it is the defendant's statutory obligation to disclose to the third party as buyer of the said property the said outstanding assessment in writing and in a specific manner. The defendant also was said to have failed to disclose this suit by the plaintiff against the defendant claiming the outstanding assessment. The third party only knew about it months after the purchase of the said property.

[32] The third party also submitted that cl. 7.1 of sale and purchase agreement dated 3 November 2010, by itself is not sufficient to establish the defendant's claim against the third party and this cl. 7.1 and cl. 2.2.5(b) contravenes s. 19(3) of Danaharta Act which make the agreement void and wholly ineffective.

[33] In addition, the third party argued that the defendant cannot seek an indemnity from the third party in the event the defendant is found liable to the plaintiff as the third party has never covenanted to indemnify the defendant and cl. 7.1 of the sale and purchase agreement is not a covenant of indemnity.

Findings Of The Court

[34] The plaintiff's power to impose annual rates within its local authority area is provided under s. 127 of the LGA.

Section 127 provides:

> The local authority may, with the approval of the State Authority, from time to time as is deemed necessary, impose either separately or as a consolidated rate, the annual rate or rates within a local authority area for the purposes of this Act or for other purposes which it is the duty of the local authority to perform under any other written law.

[35] The LGA also provides that the production of books or records containing any rate or assessment is *prima facie* proof of the making or validity of the said rates or assessment. Section 157 of the LGA provides as follows:

> The production of the books or records purporting to contain any rate or assessment made under this Part shall, without any other evidence whatever, be *prima facie* proof of the making and validity of the rates or assessment mentioned therein.

[36] The main issue in this case is in relation to the collection of the outstanding arrears in assessment with regard to the said property in the sum of RM3,769,077.09. This court has to ascertain the party who is liable to pay the said arrears based on the facts presented in this case.

[37] To achieve this task, firstly, reliance has to be made to the statutory provisions that empower the collection of the said rates and the provisions of ss. 146 and 147 of the LGA.

Section 146 reads as follows:

> All rates shall be paid by the persons who are the owners of the holdings for the time being, and until so paid shall, subject to the National Land Code (Act 56 of 1965), be first charge on the holdings in respect of which they are assessed, and if not paid within the prescribed time, shall be recoverable in the manner hereinafter prescribed.

Section 147 reads:

> (1) If any sum payable in respect of any rate remains unpaid at the end of February or August, as the case may be, the owner or owners shall be liable to pay the same together with such fee as the local authority may fix from time to time.
>
> (2) If any such sum or any part thereof remains due and unpaid by the end of February or by the end of August in each year, as the case may be, it shall be deemed to be an arrear and may be recovered as provided in section 148.

[38] The wordings of ss. 146 and 147 of the LGA are clear and unambiguous. Section 146 provides that all rates shall be paid by the owners of the holdings for the time being and s. 147 stated that the owner shall be liable for any unpaid rate.

The word 'owner' is defined under s. 2 of LGA as follows:

> "Owner"
>
> (a) in relation to any land or building, means the registered proprietor of the land and, if in the opinion of the local authority the registered proprietor of the land cannot be traced, the person for the time being receiving the rent of the premises in connection with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who would receive the same if such premises were let to a tenant, and
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> (b) in the case of subdivided buildings, includes the management corporation and any subsidiary proprietor;

and 'holding' is defined as:

> "holding" means any land, with or without buildings thereon, which is held under a separate document of title and in the case of subdivided buildings, the common property and any parcel thereof and, in the case

of Penang and Malacca, "holding" includes messuages, buildings easements and hereditaments of any tenure, whether open or enclosed, whether built on or not, whether public or private, and whether maintained or not under statutory authority.

[39] As the provisions of ss. 146 and 147 is unambiguous and plain, it is the duty of this court to give effect to its plain meaning. In relation to this duty, Federal Court in *Public Prosecutor v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273 explained as follows:

Thirdly, if the lawmaker so amends the law, to paraphrase, the words of Lord Diplock at page 54 in *Duport steels Ltd v. Sirs*, the role of the judiciary is confined to ascertaining from the words that, the lawmaker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral or to paraphrase the words of Lord Scarman at page 551 in the same case in field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments the judge has power of choice where differing construction are possible, but he must choose the construction which is his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute, unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it.

[40] Reverting to the present case, it is undisputed facts that the defendant is not the registered proprietor of the said property or the party receiving rent of the said property. As such the defendant is not the owner of the said property envisaged by ss. 146 and 147 of the LGA.

[41] The application of s. 146 of LGA has been explained by the Supreme Court in the case of *Dewan Bandaraya Kuala Lumpur lwn. Suppiah Govindasamy* [1991] 1 CLJ 429; [1991] 1 CLJ (Rep) 104 as follows:

Di Mahkamah Tinggi Hakim juga telah memberi tafsiran kepada s. 146 dan s. 160 Akta tersebut. Dengan ringkas tafsiran Hakim Mahkamah Tinggi bolehlah disebutkan seperti berikut. Perkataan owners of the holdings for the time being" dalam s. 146 kata Hakim Mahkamah Tinggi, hendaklah diberi makna "owners for the period for which the rates are imposed". Dengan erti kata yang lain Hakim berpendapat bahawa sewa atau cukai pintu hendaklah dibayar oleh tuan empunya tanah pada masa cukai itu dikenakan. Hakim juga berpendapat bahawa taksiran ini sejajar dengan keadilan kerana jikalau sebaliknya akan memberi kesusahan kepada tuan empunya tanah yang kemudian jika pihak berkuasa tempatan telah melengahkan pengutipan sewa atau cukai pintu beberapa tahun dan kemudian mengarahkan kutipan daripada tuan empunya tanah yang baru. dalah tidak adil jika tuan empunya tanah yang baru dikehendaki membayar tunggakan sewa atau cukai pintu dalam tempoh masa yang ia bukan tuan empunya tanah itu,

Pada pendapat kami tafsiran ini tidak tepat dan tidak boleh diterima dalam konteks peruntukan itu kerana maksud s. 146 Akta ialah menetapkan hutang sewa atau cukai tanah akan menjadi tanggungan atau liabiliti pertama (first charge). Lagipun s. 146 hendaklah dibaca supaya tidak berlawanan dengan s. 160 Akta tersebut. Perkataan "owners for the time being" sebenarnya bermakna tuan empunya tanah semasa (current owners).

Kekeliruan dengan tafsiran s. 146 berlaku mungkin disebabkan oleh seksyen itu sendiri yang cuba mencampuradukkan berbagai perkara atau proposisi di dalamnya. Sebenarnya s. 146 hanya meletakkan prinsip atas satu perkara dasar sahaja iaitu semua sewa atau cukai pintu hendaklah dijadikan tanggungan atau liabiliti pertama (first charge). Seksyen 146 sekarang ini mengandungi tiga perkara atau proposisi iaitu pertama, sewa atau cukai pintu hendaklah dengan syarat mengikut peruntukan Kanun Tanah Negara menjadi tanggungjawab atau liabiliti pertama, kedua, tanggungjawab terletak atas tuan empunya tanah semasa dan ketiga, memberitahu bahawa peruntukan-peruntukan yang berikutnya adalah dipakai untuk menuntut kembali sewa atau cukai pintu yang telah tidak dibayar.

[42] The provision of s. 160 of the LGA for ease of reference is as follows:

(1) Whenever any rateable holding within a local authority area is sold or transferred it shall be the duty of the seller or transferor and the purchaser or transferee within three months after such sale or transfer to give notice thereof to the local authority in Form 1 of the First Schedule hereto.

(2) Whenever the owner of any rateable holding within a local authority area dies it shall be the duty of the person becoming the owner thereof by succession or otherwise to give notice thereof to the local authority within a period of one year of the death in Form J of the First Schedule hereto.

(3) On receipt of such notice the local authority may require the production of the instrument effecting change of ownership or of a certified copy thereof.

(4) Every person who sells or transfer any rateable holding within a local authority area shall continue to be liable for the payment of all rates payable in respect of such holdings and for the performance of all other obligations imposed by this Part or by any by-law upon the owner of such holding which become payable or are to be performed at any time before notice of such transfer has been given or until the sale or transfer has been recorded in the books of the local authority.

(5) Nothing herein shall affect the liability of the purchaser or transferee to pay the rates in respect of such holding or to perform such obligation, or affect the right of the local authority to recover such rate or to enforce such obligation under this Part notwithstanding that such rates became payable or such obligations were imposed before notice of such sale or transfer had been recorded.

A (6) Every person failing to give any notice shall on conviction be liable to a fine not exceeding two thousand ringgit or to a term of imprisonment not exceeding six months or with both.

[43] It is clear that the Supreme Court in *Dewan Bandaraya Kuala Lumpur lwn. Suppiah* (*supra*) had decided that 'owners for the time being' under s. 146 B of the LGA mean the current owners. Obviously the defendant in this case is not the current owner of the said property. It is also an undisputed fact that the current owner is the third party. However, as this suit is not the plaintiff's claim against the third party but against the defendant, this court will only deal with issues to ascertain whether the plaintiff has prove its case against C the defendant on the balance of probabilities.

[44] Further in the said Supreme Court case also, Hashim Yeop Sani CJM (as he then was) elaborated on the application of ss. 160(4) and 160(5) of the LGA. It was held that s. 160(5) must be read together with s. 160(4) and parties cannot rely on s. 160(5) without resorting to s. 160(4). The court D explained this position at p. 432 as follows:

> Seksyen 160(4) dan s. 160(5) hendaklah ditafsirkan bersama. Maksud s. 160(4) ialah untuk menetapkan bahawa tiap-tiap seorang yang menjual sesuatu harta yang dikenakan sewa atau cukai pintu akan terus bertanggungjawab bagi menjelaskan semua sewa atau cukai pintu yang E dikenakan setiap masa sebelum notis pertukaran hakmilik diberi di bawah s. 160(1) atau sehingga catatan penjualan atau pertukaran itu telah dicatatkan dalam daftar pihak berkuasa tempatan. Mengikut latar belakang kes ini notis tersebut telah tidak dihantar dan tidak ada bukti yang penjualan atau pertukaran itu telah dicatatkan di dalam daftar pihak berkuasa tempatan. Responden telah diberi notis bertarikh 18 Jun 1987 F hanya setelah diberitahu dengan surat dari beliau bertarikh 19 Disember 1986 dari Dewan Bandaraya Kuala Lumpur yang ditujukan kepada penjual iaitu Yaacob Sodhy dan Salmah bte Abu Bakar @ Salmah Yaacob Sodhy berkenaan dengan tunggakan sebanyak RM973.
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> Oleh yang demikian mengikut fakta kes ini, Dewan Bandaraya Kuala G Lumpur tidak boleh bersandar kepada s. 160(5) Akta tersebut sebagai asas undang-undang untuk menahan barang-barang responden kerana tidak mungkin satu akta berkehendakkan kedua-dua pihak menjelaskan satu pembayaran.
>
> Tafsiran kedua-dua peruntukan s. 160(4) dan s. 160(5) hendaklah mengikut liabiliti yang telah dikenakan terdahulu iaitu liabiliti yang H dikenakan oleh s. 160(4) ke atas penjual melainkan jika notis dalam Borang 1 yang dikehendaki oleh s. 160(1) telah dihantar. Memberi notis ini adalah tanggungjawab yang dikenakan oleh undang-undang ke atas kedua-dua pihak iaitu penjual dan pembeli dan jika tidak dipatuhi boleh disabit dan didenda sehingga RM2,000 atau di penjara sehingga enam I bulan

[45] In the present case, from the evidence adduced, no notice under s. 160(4) has been given and no transfer or sale has been recorded in the books of the local authority. As such the plaintiff cannot rely on s. 160(5) to make its claim against the defendant.

[46] Based on the doctrine of *stare decisis*, this court is bound by the decision of the said Supreme Court in *Dewan Bandaraya Kuala Lumpur lwn. Suppiah*. As mentioned by Peh Swee Chin FCJ (as he then was) in *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 at p. 660; [1998] 1 MLJ 1 at p. 12:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its s. 3.
>
> To recap, the relevant *ratio decidenci* in *Young v. Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of coordinance jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinance jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v. Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exception so long as they are not inconsistent with the three exceptions in *Young v. Bristol Aeroplane*.

[47] Likewise in the Federal Court case of *Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173; [1967] 2 MLJ 211 where Azmi CJ (as he then was) said this:

> Each court, of course, is bound by the decisions of courts above it, but "individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren" see *Law in the Making* (6th Ed) p. 231.

[48] Therefore based on the decision of the Supreme Court on the application of law as mentioned earlier, the plaintiff cannot rely on ss. 146 or 160(5) of the LGA to establish its claim for the arrears in assessment against the defendant.

[49] The other provision that the plaintiff relied on to substantiate its claim against the defendant is s. 156 of the LGA which reads as follows:

> Notwithstanding anything herein, an arrear may be sued for and recovered as a debt in a court of competent jurisdiction by the local authority in its official name from any person liable to pay the same.

[50] It is clear that this s. 156 empowers the local authority to sue and recover as a debt any arrears from a person liable to pay the said arrears.

[51] However in the present case, as discuss earlier, the defendant is not the owner of the said property as envisaged under ss. 146 or 147 of the LGA. As such the defendant is not the person or party liable to pay the arrears under the LGA. Therefore s. 156 is not applicable for plaintiffs to bring the claim against the defendant.

[52] The next issue is whether plaintiffs claim is a disclosed claim within the meaning of s. 14(3) of Danaharta Act.

[53] Section 14(1), (2) and (3) of Danaharta Act provides as follows:

> 14. (1) The Corporation may acquire any asset, whether such asset is held by the seller alone or jointly with any other person and upon such acquisition such asset shall, on and from the vesting date, vest in the Corporation either alone or jointly with that other person, as the case may be.
>
> (2) A vesting under subsection (1) shall have effect according to the provisions of this Part, and, notwithstanding the provisions of the Civil Law act 1956 (Act 67) or any other law, shall be binding on any person thereby affected in the manner provided in this Part.
>
> (3) The Corporation shall, on and from the vesting date for an asset, acquire all of the seller's present and future rights, title and interest in and disclosed obligations with respect to such asset, free of any encumbrance or claim save for any registered interest prevailing as at the vesting date and disclosed claims.

[54] By virtue of s. 14(3), Danaharta is only responsible for a disclosed claim.

[55] Section 2 of Danaharta Act defines 'claims' and 'disclosed claims' as follows:

> "claims" means any claim, defence, counterclaim, set-off, enquiry, action, legal proceeding or equitable interest of any kind relating to or arising out of an asset by the obligor or any third party against the seller or in respect of the asset, whether vested or contingent, present or future,
>
> "disclosed claim" in relation to -
>
> (a) section 13 to 18 means any specific claim disclosed to the Corporation in writing prior to the vesting date.

(b) section 19 means any specific claim disclosed by the Corporation to the acquire in writing prior to the date specified in the transfer certificate.

[56] In the present case, the fact shows that there was no claim in writing for the arrears in assessment by the plaintiff to the defendant prior to the vesting date. The vesting date was on 11 March 1999 and the plaintiff filed the writ and statement of claim on the 22 August 2003. Strangely, the notice of demand dated 3 September 2003 was issued to the defendant after the commencement of this suit. Therefore plaintiffs claim is not a disclosed claim within the meaning of s. 14 of Danaharta Act.

[57] Plaintiff's claim against the defendant is also based on the letters by the Special Administrator dated 9 February 2001 and 29 April 2001 where settlement as regards the said arrears in assessment was proposed.

[58] In relation to this, the plaintiff averred that the special administrator acted on behalf or agent for the defendant. As such it shows that the defendant has knowledge and was liable to pay the said arrears.

[59] This contention clearly is untenable and unsupported by the provisions of the Danaharta Act.

Section 32 provides as follows:

> The Special Administrator shall, in the administration of the affected person, be deemed to be acting as the agent of the affected person.

Affected person is defined under s. 21 of Danaharta Act which reads:

> In the Part, unless the context otherwise requires -
>
> "affected person" means -
>
> (a) any company owing a duty or liability under a credit facility to the Corporation or any subsidiary of the Corporation, whether present, future, vested or contingent.

"Corporation" here means the Pengurusan Danaharta Nasional Berhad as defined under s. 2 of Danaharta Act.

[60] Therefore, it is clear that the special administrators appointed in this case under s. 25A of Danaharta Act are not acting for or agent of the defendant but agent and acting on behalf of Utama Impian Sdn Bhd.

[61] The said letters by the special administrators to the plaintiff dated 9 February 2001 and 29 April 2001 were also signed by them on behalf of Utama Impian Sdn Bhd.

[62] Based on aforesaid reasons, on the balance of probabilities the plaintiff has failed to prove its claim against the defendant.

[63] As to the defendant's case against the third party, it is trite law that only if the defendant is held liable to the plaintiff, the defendant has the right to contribution or indemnity from the third party. This was explained by the

Supreme Court in the case of *Mat Abu Man v. Medical Superintendant, General Hospital Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226 where Hashim Yeop Sani CJ (as he then was) said:

> We also do not think that a proceeding under O. 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.
>
> Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is held liable.

(See also *Ng Kim Hwa v. Ng See Chow & Ors* [1993] 1 LNS 89; [1993] 2 MLJ 155).

[64] As such, since this court had decided that the defendant is not liable to the plaintiff, the defendant's right to claim against the third party does not arise.

[65] In any event, to avoid multiplicity of actions based on the same facts and to deal with the counterclaims by the third party, this court will address the issues raised by the defendant and the third party.

[66] The defendant submitted that in the event the defendant is held liable to pay the said outstanding assessments, the third party is then liable to indemnify the same to the defendant pursuant to cls. 7.1 and 2.2.5(b) of the agreement.

[67] Clause 7.1 provides:

> All outstanding quit rent and assessments payable in respect of the property shall be borne by the purchaser.

and cl. 2.2.5(b) reads as follows:

> The property is sold -
>
> subject to:
>
> ... (b) all matters, notices, charges and claims affecting the PROPERTY.
>
> The PURCHASER shall be deemed to have purchased with full knowledge and notices of all such schemes or proposed schemes including any layout plans, matters, notices, charges and claims which shall be complied with and discharged by the PURCHASER who shall not be entitled to make or raise any objection or requisition whatsoever in respect thereof.

[68] As mentioned earlier, the defendant powers, duties and obligation is governed by a special law which is the Danaharta Act. This law also underlined the defendant's obligations with regard to disposal of assets to a purchaser.

[69] The relevant provision which deal with disposal of assets by the defendant is s. 19 of Danaharta Act.

Section 19(1) empowers the defendant to dispose the assets which reads as follows:

> The Corporation may, in accordance with the provisions of this section, dispose of any of the Corporation's assets, whether vested or not in the Corporation and any property over which the Corporation has a security whether as a chargee, mortgagee, assignee, lien holder or otherwise.

Section 19(3) provides:

> A disposition of an asset by the Corporation to an acquiree shall have the effect of transferring the Corporation's present and future rights, title and interest in and disclosed obligations with respect to such asset, free of any encumbrance or claim save for registered interests prevailing as at the date specified in the transfer certificate as the date of disposition and disclosed claims.

[70] The issue here is whether the claim for arrears in assessment falls within the category of "registered interest" or "disclosed claim" under s. 19(3).

[71] Reading the definition of "registered interest" under s. 2 of Danaharta Act, clearly shows that the claim for arrears in assessment is not a "registered interest". Section 2 defined 'registered interest' as follows:

> "registered interest" means any right or interest in -
>
> (a) a charge to which subsection 108(3) of the Companies Act 1965 applies and is duly registered in accordance with subsection 108(1) of the Companies Act 1965; or
>
> (b) land which is duly registered under the Strata Titles Act 1985, the National Land Code, the Land Ordinance of Sabah or the Land Code of Sarawak;

[72] Next, with regard to the issue of disclosed claim, as stated earlier, s. 2 of Danaharta Act defined 'claims' to mean *inter alia* any claim, action and legal proceeding and 'disclosed claim' in relation to s. 19 means 'any specific claim disclosed by the corporation to the acquire in writing prior to the date specified in the transfer of certificate'.

[73] This obligation to disclose the claim in writing and in specific manner was clearly mentioned in the case of *Tan Tak & Ors v. Mahabuilders Sdn Bhd* (*supra*) at p. 502 as follows:

> [45] A "disclosed claim" as it applies to an acquisition from Danaharta under s. 19 is defined under s. 2(b), as:
>
> > … any specific claim disclosed by the Corporation to the acquire in writing prior to the date specified in the transfer certificate:

A [46] The subsection envisaged a statutory obligation on the part of the seller (in this case Danaharta) to make a formal and specific disclosure in writing describing the nature of each of the claims of the purchasers made referable to the intended acquisition and sufficient to provide the acquiree the opportunity to appraise the value of the claims to make a commercial decision before acquiring.

B [47] A non specific notice to the acquiree than there were purchasers of units on the land to be acquired without more would not be sufficient to constitute a 'disclosed claim' under the Act and would not discharge that obligation.

C **[74]** Reverting back to the present case, firstly this suit by plaintiff against the defendant to claim the outstanding arrears is a claim as defined under s. 2 of Danaharta Act. Evidence shows that this suit was not disclosed to the third party when both parties entered into the agreement to purchase the said property or prior to the date specified in the transfer of certificate which is on the 23 August 2011.

D **[75]** There was also no disclosure of the arrears in assessment as envisaged under s. 19(3) in the said agreement. This is clearly admitted by DWI in his evidence.

[76] Defendant also submitted that the arrears in assessment was disclosed E to the third party in a CD containing the tender package given to the third party before 4 August 2010 when the third party put in its bid to purchase the said property.

[77] However this contention is untenable as the facts shows that it is highly improbable due to the fact that the valuation report (D9A) which was F said to be part of the 'tender package' was not in existence before 4 August 2010.

[78] Having perused D9A, it is clear that it was prepared on 2 September 2010 which is after the close of tender. The date of inspection of the said property by valuer before this valuation report was prepared as seen at p. 5 G of D9A, was on 13 August 2010 which was also after the close of tender. The land search at appendix C of D9A was made on 19 August 2010 which was also after the close of tender.

[79] No reasonable explanation was given by the defendant especially by H DW2 on these discrepancies.

[80] The defendant also contends that apart from the 'tender package', the letters written by the third party's solicitor, Messrs May Chan Eiza and Co and correspondences between the defendant's solicitor and the third party's solicitors shows that the third party had full knowledge and was aware of the I said outstanding assessment.

[81] This contention is unacceptable as correspondences between solicitors do not meet the statutory obligation of 'disclosed claim' envisaged under s. 19(3) as discussed earlier.

[82] Next, the defendant is reliance on the agreement, in particular cls. 7.1 and 2.2.5(b) to substantiate its claim against the third party is also untenable as parties in the present case could not contract out of the statutory obligation provided in the Danaharta Act. Clauses 7.1 and 2.2.5(b) is clearly inconsistent with the requirement of s. 19(3) of the Danaharta Act.

[83] In Federal court case of *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31, it was held that the parties could not contract out of the statute.

Suffian LP (as he then was) said this:

> Thus it is clear that only terms and condition designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and condition which purport to get round the Act and rules. So as to remove the protection of home buyers may not be so inserted.

[84] In this case, r. 12 Housing Developers (Control and Licensing) Rules 1970 provides that every contract of sale shall be in writing and shall contain within its terms and conditions set out in the paragraphs of the rule. The relevant paragraphs are as follows:

(i) paragraph (a)

> the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the signing of the contract of sale.

(ii) paragraph (r)

> provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight percent per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale.

[85] However cl. 32 of the sale and purchase agreement was relied by the developer in this case to exclude liability.

Clause 32 provides:

> The vendor shall not be liable to purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed hindered or prevented by *force majeure* including but not limited to acts of God, strikes, lockouts, riots, civil commotion act of war or the disability of contractors and subcontractors employed by the vendor either commencing, carrying

A on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatsoever nature beyond the control of the vendor.

[86] In the same case, the Federal Court held as follows:

B For reasons given above, we are of the opinion that clause 32, being inconsistent with rule 12 and not designed to comply with the requirement of the rules and in the absence of waiver or modification by the controller of Housing under rule 12(2), is void and therefore the developer is liable in damages for the delay in completion.

[87] In *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1990] 2 CLJ C 1044; [1990] 2 CLJ (Rep) 125 it was held that any attempt to contract out of clear statutory provisions would be void and wholly ineffective as being contrary to the public policy.

[88] Likewise in the present case, cls. 7.1 and 2.2.5(b) purport to get round the provision of s. 19(3) of the Danaharta Act and inconsistent with the said D statutory obligation. As such the said cls. 7.1 and 2.2.5(b) are void and unenforceable.

[89] In the circumstances, this court finds that the claim for arrears in assessment are not a disclosed claim as envisaged under s. 19(3) of the E Danaharta Act and as such, the third party is not liable to the defendant for the said arrears.

Conclusion

[90] The plaintiff's claim against the defendant is dismissed with costs of RM20,000 to be paid by plaintiff to the defendant. F

[91] This court also allows the counterclaim by the third party for declaration that:

(i) the defendant's claim against the third party is neither a 'registered interest' nor a 'disclosed claim' under the Pengurusan Danaharta G National Berhad Act 1998.

(ii) the third party is not liable to indemnify the defendant against the payment of any arrears in assessment in relation to Plaza Utama for any period prior to 23 August 2011.

H **[92]** This court further order that the defendant to pay costs of RM20,000 to the third party.

I